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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of:	)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS,	)	File No. BPH-870831MI
A LIMITED PARTNERSHIP)	
)	
For Construction Permit)	
for an FM Broadcast Station)	
)	
)	
Biltmore Forest,)	
North Carolina)	
)	
To: The Commission)	

OPPOSITION TO AMENDMENT

Respectfully submitted,

WILLSYR COMMUNICATIONS,
LIMITED PARTNERSHIP

Stephen T. Yelverton, Esq.
601 Thirteenth St., N.W.,
Suite 500 North
Washington, D.C. 20005
Tel: (202) 329-4200

November 22, 1999

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OPPOSITION TO AMENDMENT

Willstyr Communications, Limited Partnership ("Willstyr"), by its counsel, pursuant to 47 CFR 1.294 (b), hereby submits this opposition to an amendment filed by Liberty Productions, a Limited Partnership ("Liberty"), with the Commission on November 10, 1999. Therein, Liberty seeks to amend its application, filed in 1987, to specify a new tower site. Willstyr's opposition is timely filed pursuant to 47 CFR 1.4 (g) and (h).

The Presiding Judge in the hearing proceeding determined that Liberty did not and never had "reasonable assurance" of the availability of the tower site that it specified in its application filed in 1987. According to the Presiding Judge, Liberty made a "half-hearted" and disingenuous effort to obtain a tower site and then made an application certification in bad faith as to its availability. The tower site specified in Liberty's application was already leased to another applicant and Liberty had been informed of the lease and the unavailability to it of the proposed tower site. Memorandum Opinion and Order, FCC 89M-1080, paras. 3-6, 8-9, rel. April 5, 1989; Initial Decision, FCC 90D-18, findings paras. 36-40, 46-50, conclusions paras. 7-8, and n. 14.

Only after a post-designation motion to enlarge the issues was filed against it in 1989, did Liberty first make a serious effort to obtain a tower site. Liberty's attempt to amend then to a new tower site was denied by the Presiding Judge because of a lack of "good cause." Memorandum Opinion and Order, FCC 89M-1080.

Under established Commission policy in effect in 1989 and still in effect, and under the law of this case, where an applicant has never had "reasonable assurance" that its specified tower site is available, it cannot as a matter of law demonstrate "good cause" to amend to a new site. Dutchess Communications Corp., 58 RR2d 381, 389-390 (Rev. Bd. 1985); Mary A. Bohi, 59 RR2d 1686, 1689 (Rev. Bd. 1986); Elijah Broadcasting Corp., 3 FCC Rcd 5148, 5151 (Rev. Bd. 1988). Moreover, where "good cause" cannot be demonstrated the application is subject to immediate dismissal. Webster-Fuller Communications, 65 RR2d 1068 (Rev. Bd. 1988).

Accordingly, the November 10, 1999, amendment of Liberty must be rejected. Under controlling precedent and under the law of this case, as noted above, Liberty could not as a matter of law make a showing of "good cause" to amend. Indeed, its application should have been dismissed with prejudice over 10 years ago because it was fatally defective at the time of filing in 1987 and unamendable.

Liberty is apparently relying upon First Report and Order in MM Docket No. 97-234 (Implementation of Section 309), FCC 98-194, para. 99, rel. August 18, 1998, to justify the amendment of its application to specify a new tower site. However, nothing therein even suggested the elimination of the requirement of demonstrating "good cause" to amend to a new tower site. The Commission only stated that it would not adjudicate issues as to whether the winning bidder has "reasonable assurance" of its tower site, unless it involves a question of a false certification.

The rationale for the Commission's action is that the payment requirements imposed on the auction winner would serve to "discourage insincere proposals." However, in the case of Liberty, the Presiding Judge ruled in 1989-90 that its application proposal and tower site certification was wholly insincere. Initial Decision, FCC 90D-18, conclusions para. 8, Liberty's "feeble, half-hearted" attempt to obtain a tower site "strains credulity."

Accordingly, because Liberty has already been adjudicated to have acted in an "insincere" manner with respect to its tower site certification, whatever changes in policy the Commission made with respect to tower site certifications for auction winners would have no applicability to Liberty. Such policy changes would apply only to those applicants who can otherwise demonstrate "good cause" to amend and where they have not already been adjudicated to have filed speculative applications with insincere tower site certifications.

The sole recourse of Liberty for acceptance of its amendment to is persuade the Commission to reverse the findings and conclusions of the Presiding Judge that it had no tower site at the time of filing in 1987 and that its tower site certification was insincere and frivolous. However, the findings of fact of the Presiding Judge with respect to Liberty are supported by the overwhelming weight of the evidence in the record of this proceeding, including adverse credibility findings, and the conclusions of law are fully consistent with established precedent.

WHEREFORE, in view of the foregoing, the amendment of Liberty must be rejected. Pursuant to the factual findings of the Presiding Judge and under the law of this case, Liberty has been adjudicated as never having a tower site and as having submitted an insincere and bad faith tower site certification in its application as initially filed in 1987 and thus, as matter of law, cannot demonstrate "good cause" to amend to a new tower site. As a result, Liberty's application has been and remains subject to dismissal as fatally defective from the time of filing in 1987 and unamendable.

Respectfully submitted,

WILLSYR COMMUNICATIONS, LIMITED PARTNERSHIP

By: 

Stephen T. Yelverton, Esq.

601 Thirteenth St., N.W., Suite 500 North
Washington, D.C. 20005

Tel. 202-329-4200

November 22, 1999

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 89M-1080
Washington, D.C. 20554

9462

In re Applications:	)	MM Docket No. 88-577
)	
NATIONAL COMMUNICATIONS INDUSTRIES	)	File No. BPH-870831MF
)	
RAKEL COMMUNICATIONS, INC.	)	File No. BPH-870831MG
)	
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	)	File No. BPH-870831MI
)	
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	)	File No. BPH-870831MJ
)	
BILTMORE FOREST BROADCASTING FM, INC.	)	File No. BPH-870831MK
)	
SKYLAND BROADCASTING COMPANY	)	File No. BPH-870831ML
)	
BILTMORE BROADCASTING INC.	)	File No. BPH-870831MM
)	
UNITED BROADCASTING ENTERPRISES, INC.	)	File No. BPH-870831MN
)	
ORION COMMUNICATIONS LIMITED	)	File No. BPH-870901ME
)	
HARBINGER BROADCASTING COMPANY	)	File No. BPH-870901MF
)	
For a Construction Permit)	
For a New FM Station)	
in Biltmore Forest, North Carolina)	

MEMORANDUM OPINION AND ORDER

Issued: April 4, 1989

Released: April 5, 1989

1. Liberty Productions, Inc. (Liberty) seeks a ruling on a Petition for Leave to Amend. They filed their motion on March 20, 1989, and at this advanced state of the proceeding want to change transmitter sites.¹

2. The Mass Media Bureau commented favorably on Liberty's request on March 29, 1989. But Willsyr Communications Limited Partnership (Willsyr) and Orion Communications Limited (Orion) each opposed Liberty's petition the same day. On March 30, 1989, Orion supplemented its opposition.

¹ This wholesale engineering change goes well beyond the "perfecting amendment" contemplated by the Prehearing Order. See FCC 89M-361 released February 3, 1989, at paras. 9-10.

Ruling

3. Liberty's motion must be denied for any one of four reasons. First, it must be denied because it is based on a faulty premise; namely, that it had a "reasonable assurance" that its original site was available to it. That is inaccurate. Eighteen months ago they made a half-hearted but unsuccessful effort to obtain some of Ms. Vickey Utter's land on Busbee Mountain to use as a transmitter site.

4. The record is clear that there was not then any meeting of the minds between Ms. Utter and Liberty's Ms. Klemmer. Ms. Utter has said that "... I am certain that I did not give any assurance to Ms. Klemmer, or to any representative of Liberty, that my property would be available to it." (Underlining Ms. Utters). See her statement of February 22, 1989.

5. Later, on March 29, 1989, Ms. Utter described that one meeting with Ms. Valerie Klemmer, in part, as follows:

" ...

We talked, in my yard, for a brief period concerning my property lease to Brian Lee [of Orion]. At that time or any other time I never gave Valerie the promise or assurance she could use my land or my name when she filed the application with the FCC.

If we had discussed this or I had given her this assurance I certainly would have remembered and I would have been looking for her to make a commitment of some sort ..."

6. Aside from this unsuccessful effort, Liberty did nothing for the next 18 months. They never made any effort to obtain Ms. Utter's authorization, and they never even checked back with her to be certain they had, in fact, been given reasonable assurance in the first instance that the site was available. That is not the due diligence demanded by Erwin O'Conner Broadcasting Co., 22 FCC 2d 140 (Rev. Bd.) See Duchess Communications Corp., 58 RR 2d 381, 389-390 (Rev. Bd. 1985).

7. Liberty has also failed to pass at least three other of O'Conner's six point test. Despite their bare assertion to the contrary, they have failed to show that no new issues will need to be added if their amendment were granted. They now propose a site on an existing tower. But they haven't shown, or even attempted to show that their new proposal would not exceed the radio frequency (RF) radiation guidelines under 47 CFR 1.1307(b). Without such a showing Liberty's amendment could not possibly be accepted.

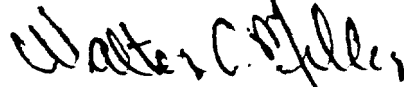
8. Next, Liberty cannot meet the critical requirement of unforeseeability. 47 CFR 73.3522(b) provides that a post designation engineering amendment will not be accepted unless the applicant can show that the amendment is necessitated by events which the applicant could not have reasonably foreseen. Having failed to obtain a reasonable assurance from Ms. Utter in the first instance, and having never obtained any type of written permission from Ms. Utter to use her land, Liberty cannot argue that it didn't

foresee the need to specify a new site until a year and half later. See Belo Broadcasting Corp., 68 FCC 2d 1313, 1323-1324 (1978).

9. Finally, Liberty hasn't shown that its amendment isn't required by their own voluntary act. Indeed the opposite is true. Aside from a cursory meeting with Ms. Utter in her front yard, Liberty's representatives have taken no steps whatsoever to obtain a transmitter site. They have dilly-dallied for some eighteen months. It was only when they were confronted with Orion's February 27, 1989 Motion to Enlarge that they voluntarily started processing a new site.

SO the Petition for Leave to Amend that Liberty Productions, Inc. filed on March 20, 1989, IS DENIED.²

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge

² A site availability issue and a false site certification issue has been added against Liberty. See FCC 89M-1025, released March 30, 1989.

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney at law, do hereby certify that on this 22nd day of November, 1999, I have caused to be hand-delivered or mailed, U.S. Mail, first-class, postage prepaid, a copy of the foregoing "Opposition to Amendment" to the following:

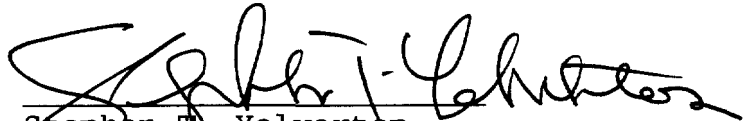
John I. Riffer, Esq.*
Associate General Counsel
Federal Communications Commission
Washington, D.C. 20554

Chief, Audio Services Division *
Federal Communications Commission
Washington, D.C. 20554

Timothy K. Brady, Esq.
P.O. Box 71309
Newman, GA 30271-1309

Lee Peltzman, Esq.
Shainis & Peltzman
1901 L St., N.W., Suite 290
Washington, D.C. 20036-3506

Donald J. Evans, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Ave., N.W., Suite 750
Washington, D.C. 20005


Stephen T. Yelverton

* Hand Delivery